October Term, 19[illegible]

No. [illegible]

WILLIAM L. ADAMS,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

BRIEF FOR THE PETITIONER

[illegible]
[illegible]

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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,
Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

BRIEF FOR THE PETITIONER.

Opinions Below.

The case was initially tried before a trial commissioner and jury in the Quarterly Court of McCracken County, Commonwealth of Kentucky. No opinion was delivered by said court [R. 2-3].

On appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky [R. 3-4], the case was tried *de novo* before a judge and jury. No opinion was delivered by said court [R. 5].

The *per curiam* opinion of the Court of Appeals of Kentucky, Chief Justice Moremen dissenting, overruling petitioner's motion for an appeal [R. 121-122], is reported in 386 S.W. 2d 270.

No opinion was delivered in overruling petitioner's petition for rehearing [R. 129].

Jurisdiction.

The judgment of conviction of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, was entered on February 28, 1964 [R. 94-95]. Petitioner's motion for an appeal from said judgment of conviction was denied in a *per curiam* opinion by the Court of Appeals of Kentucky on January 22, 1965, Chief Justice Moremen dissenting, without opinion [R. 121-122]. Petitioner's due and timely petition for rehearing [R. 123-127] was overruled by the Court of Appeals of Kentucky on March 19, 1965 [R. 129; 386 S.W. 2d 270]. On June 8, 1965, by order of Mr. Justice Stewart, the time within which to file a petition for writ of certiorari was extended to August 16, 1965 [R. 129]. The petition was filed on August 13, 1965 and was granted on April 25, 1966, limited to Question 2 presented by the petition [R. 130], as set forth hereinafter.[1]

Question Presented.

Whether Section 436.100 of Kentucky Revised Statutes, on its face and as construed and applied, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioner, of liberty without due process of law contrary to the provisions of the First, Fifth and Sixth Amendments as subsumed into the due process provisions of the Fourteenth Amendment to the Constitution, because:

(a) the statute arbitrarily and capriciously provides that the sale of any publication found to be

[1]Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart were of the opinion that certiorari should be granted on all the questions presented by the petition [R. 131].

obscene "shall be prima facie evidence" that the seller had "knowledge of the obscene character" of the publication;

(b) the court below arbitrarily refused to instruct the jury that if the jury found that the petitioner had a good faith belief that the publications involved were not obscene, then petitioner was entitled to an acquittal; and

(c) the court below arbitrarily excluded from consideration by the jury substantial evidence, both oral and documentary, showing that petitioner had no knowledge of the contents or of the alleged obscenity of the publications involved in the prosecution herein upon which the judgment of conviction against petitioner was rendered.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Kentucky Revised Statutes, Section 436.100, subdivisions 1, 2 and 4, are annexed hereto as Appendix A.

Statement of the Case.

(a) By complaint, sworn to by Mrs. Katherine Wathen and filed in the Quarterly Court of McCracken County, Commonwealth of Kentucky on October 11, 1963 [R. 1-2], petitioner was charged with selling, offering to sell, having in possession, with intent to sell and offer to sell, two magazines, to wit: Volume 1, No. 38 of a publication known as "Spree", and Volume 2, No. 6 of a publication known as "High Heels", it being alleged by the affiant Wathen that both of said publications were "obscene" and contained "obscene pic-

tures and writing or printed material of an indecent character". The verified complaint alleged that petitioner had knowledge of the "contents or character" of the two magazines [R. 1]. The case came on for trial before a Trial Commissioner and a jury of six in the Quarterly Court of McCracken County, Commonwealth of Kentucky. The jury found petitioner guilty as charged, and fixed the punishment at a fine of $100.00 [R. 3]. Petitioner prosecuted an appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky [R. 3-4], and the case thereupon came on for trial *de novo* before the Honorable C. Warren Eaton, a Judge of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, and a jury, on February 27 and 28, 1964 [R. 5].

(b) The petitioner is in the wholesale news distribution business, with agencies in Shelbyville, Jackson and Nashville, Tennessee; Carbondale, Illinois, and Paducah, Kentucky [R. 27]. For many years, the petitioner has also owned and operated a large retail book store and newsstand known as Readmore, located in Paducah, Kentucky [R. 28], where hard cover books from all major publishers are sold, including technical works, religious treatises and children's books [R. 28-29]. Petitioner is a member of the American Book Sellers Association and Christian Book Sellers Association [R. 29]. Readmore also sells newspapers, paperback books and magazines [R. 30]. There are about 11,000 titles handled at Readmore each month, to wit, about

> "three thousand titles, approximately, on sale, magazines, all time, and approximately four thousand titles of hard books, and approximately four thousand titles of the paper back books, and we have the newspapers in addition" [R. 30].

The case against petitioner was as follows: On the 28th day of September, 1963, Katherine Wathen, a resident of Paducah, went into Readmore, and purchased from a saleslady in the store, two magazines. For each of the periodicals—"High Heels", vol. 2, No. 6 [Comm. Ex. 1, R. 7] and "Spree", No. 38 [Comm. Ex. 2, R. 7]—the witness paid $1.00 plus tax [R. 7]. Prior to the purchase on September 28, 1963, Mrs. Wathen called Mrs. Patsy McWaters and told her that she, Mrs. Wathen, was going to Readmore "to buy magazines" and that she would like Mrs. McWaters to be present when the purchase was made, "so she could be a witness" in court [R. 16]. Thus, Mrs. McWaters was present at the time of the purchase of the two magazines [R. 9]. The magazines were stapled "so that you couldn't thumb through them" [R. 8]. After the purchase of the publications, Mrs. Wathen took the two magazines home, read "practically all" of the contents, and then brought them to the courthouse where "the summons was issued" [R. 10].

Patsy McWaters [R. 19] testified that she went to Readmore at Mrs. Wathen's telephonic request [R. 19]. Mrs. McWaters witnessed the purchase of the two magazines from the sales clerk [R. 19].

Reverend Herbert Simpson [R. 21], a minister residing in Paducah [R. 21] and a member of the Citizens for Decent Literature [R. 24], testified that petitioner, in May of 1963, met with a ministers committee "on moral and social welfare" at the invitation of the ministers [R. 21], where they discussed the same "class" of magazines as the publications involved in the case herein [R. 23]. The group of ministers was interested in what "rules or standards" petitioner was main-

taining in the store [R. 24]. Petitioner indicated, according to the witness, that he stapled "this type of magazine" together so that they could not "be thumbed through by either teenagers or adults" [R. 24], and the ministers "appreciated this knowledge coming to us" [R. 24]. Petitioner asked the members of the group to let him know about any magazine which they found objectionable and he would look at it and give it his attention, but the organization never furnished him with the name of any such magazine [R. 25-26]. At the meeting with petitioner, the ministers' organization did not specifically name any magazine [R. 24].

The Commonwealth rested its case [R. 26].

The petitioner testified that it was his policy at Readmore to cooperate with any group or even individual that came to him to express a complaint [R. 32]. The volume of books and periodicals handled monthly at Readmore was extremely large [R. 30]. Petitioner did not even know that the two magazines herein involved were on the stand, and the first time he learned about them was when he received the summons based on Mrs. Wathen's complaint [R. 38].

Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office Department, and that he had written to his publishers to this effect [R. 31, 33-34; Deft. Ex. 1 for ident.]. Petitioner offered to prove that a wide variety of comparable magazines were sold by his distribution agencies throughout the numerous communities and areas serviced by said agencies, none of which magazines had ever been barred or restricted by any governmental authority or community in the areas where the magazines were sold [R. 35-37]. All these efforts by

petitioner to prove lack of unlawful knowledge or intent were rejected by the trial court [R. 30-32, 33-34, 35-37].

Curelia Staudt [R. 45], on behalf of petitioner, stated that she had been employed at Readmore as a clerk for some five years [R. 45]. The magazines were kept behind the register with instructions not to sell them to anyone under twenty-one years of age [R. 46]. The magazines were not stapled [R. 46]. At one time they had been, to keep people from standing and leafing through them without buying the periodicals [R. 47]. The petitioner came in about once a week [R. 48].

Wade Sherrill [R. 48], on behalf of petitioner, testified that he was employed as receiving clerk and general warehouse manager for petitioner, doing business as the Basin News Company, the wholesale distributor for the Kentucky area as well as Missouri, Tennessee and parts of Illinois [R. 49]. An attempt was made to prove through the witness that he was under instructions as a matter of policy not to distribute magazines which had no second-class mailing permits, but objections to such testimony were sustained [R. 49]. The witness was also asked whether it was possible to check all the publications as to contents, but objections to this line of questions were also sustained [R. 50].

The petitioner called Dr. C. S. Lowry [R. 51], holder of a Bachelor of Arts degree and a Master of Arts degree from Harvard University, and a Ph. D. degree from the University of Kentucky [R. 51]. Dr. Lowry has been with Murray State College at Murray, Kentucky for almost forty years, and is presently head of the Department of Social Science [R. 51].

Dr. Lowry, at the request of counsel, had examined the two magazines here involved [R. 54]. The witness stated that he was aware of the extent to which magazines of this type sold in the various areas in the community and in other States [R. 55]. In the opinion of the witness, the publications did not exceed customary limits of candor in the community, nor "go as far as some which are generally accepted" [R. 56]. Dr. Lowry was of the opinion that the magazines did not create a shameful or morbid interest in sex or nudity in the average person who might examine them [R. 56]. The witness had read the magazines from cover to cover [R. 57]. None of the textual material, in the opinion of the witness, was obscene, nor did the description of sex in the magazines exceed the description of sex in books and publications generally accepted [R. 57].

The petitioner offered through the witness to put into evidence books which had been sold and accepted in Kentucky, Tennessee and the entire geographical area [Deft. Exs. 4-9 for ident.; R. 60-61][2] but, upon objection by the Commonwealth the offer was rejected [R. 61].

Petitioner called James Apple, an attorney-at-law [R. 61], as a witness in his behalf. Petitioner offered to prove through the said witness that the publication involved in the case of *Sunshine Book Co. v. Summerfield* was "more revealing of the body than either of the two publications in question here" [R. 62; Deft. Ex.

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[2]The books offered into evidence were *Tropic of Capricorn* by Henry Miller [Deft. Ex. 4]; *Carpetbaggers* by Harold Robbins [Deft. Ex. 5]; *Another Country* by James Baldwin [Deft. Ex. 6]; *Lady Chatterley's Lover* by D. H. Lawrence [Deft. Ex. 8]; and *One Hundred Dollar Misunderstanding* by Robert Gover [Deft. Ex. 9].

10 for ident.]. An objection to this offer of proof was sustained by the trial court [R. 62].

The petitioner offered as a witness in his behalf C. L. Werner, who was an investigator employed by counsel for petitioner [R. 63]. The petitioner offered to prove that the witness had obtained certain books of art from the Carnegie Public Library in Paducah, books of art which were available to the general public [R. 63-64]. The witness had made copies of pictures out of these various art publications and these pictures were offered into evidence as defendants Exhibits 11 through 19 [R. 64-66]. An objection to the offer of this testimony and all of the exhibits was sustained by the trial court [R. 66].

In rebuttal, the Commonwealth called Frederick G. Schlafer [R. 67], a Pastor of the Baptist Tabernacle, who testified that he had been a minister since 1938 [R. 68]; that "within the last 24 hours" he had looked at the two magazines and that in his opinion the magazines would appeal to the longing for something lewd or lecherous in the average person. [R.69].

There were requests by petitioner for instructions to the jury which were, in most cases, refused [R. 95-109]. Among the instructions requested by petitioner which were refused were the following:

> "If you do not find beyond a reasonable doubt that the defendant kept for sale or sold the magazines mentioned in the complaint, knowing the contents of the magazines and knowing them to be obscene, you should find the defendant not guilty." [Deft. Inst. No. 6; R. 97].
>
> "If you do not find beyond a reasonable doubt that at the time of the keeping for sale or sale of

the said magazines named in the complaint, the defendant, with knowledge of the nature and obscene character of the magazines, had the specific intent to deprave or corrupt the average person who might read them by inciting lascivious thoughts or arousing lustful desires, you must find the defendant not guilty." [Deft. Inst. No. 8; R. 97].

"If you find that the defendant had a good faith belief that the magazines in question were not obscene, you must acquit the defendant even if you personally believe that the magazines are obscene." [Deft. Inst. No. 19; R. 100-101].

"In this case the commonwealth must prove beyond a reasonable doubt that the defendant had a specific intent to violate the law. You may not infer the specific intent merely on the basis of suspicion, conjecture or surmise, and if you upon all of the evidence you are not satisfied beyond a reasonable doubt that the defendant had such a specific intent you should find the defendant not guilty." [Deft. Inst. No. 20; R. 101].

"Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that private transactions have been fair and legal; that the ordinary course of business have been followed, and that the law has been obeyed." [Deft. Inst. No. 21; R. 101].

"The state of mind of the defendant can only be established by his own acts and declarations, and cannot be imputed to him by the acts and declarations of others." [Deft. Inst. No. 22; R. 101].

"In every crime there must exist a union or joint operation of act and intent. The burden is

always upon the prosecution to prove both act and intent beyond a reasonable doubt." [Deft. Inst. No. 23; R. 101].

The trial court instructed the jury that if the jury believed from the evidence, beyond a reasonable doubt, that petitioner, as the owner of Readmore, knowingly had for sale, or in his possession with the intent and purpose that the same be sold the magazines referred to in the evidence; and that said magazines were sold by an employee of petitioner, and that said employee had been authorized by petitioner to sell said magazines and had assented to the sale of them; and that the petitioner had knowledge of the contents and character of the said magazines; and that the jury believed, beyond a reasonable doubt, that either of said magazines were obscene and of an indecent character, the petitioner could be found guilty [R. 109]. The jury returned a verdict of guilty and fixed the punishment at a fine of $250.00 [R. 94].

Summary of Argument.

It has been settled by decisions of this Court that the standards and criteria for judging the obscenity of a writing are governed by the demands of the Constitution. Obscenity is not immune from constitutional limitations; it must be measured by standards that satisfy the First Amendment. The definition of "obscenity" includes, at the very least, the following elements: (1) the material must go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; (2) the dominant theme of the material, taken as a whole, must appeal to prurient

interest; (3) the material must be utterly without social importance; and (4) the constitutional status of the material cannot be made to turn on a weighing of the social importance of the material against its alleged prurient appeal.

In *Smith v. California,* 361 U.S. 147 this Court held that proof of scienter is constitutionally required in any obscenity prosecution. It was held that without a requirement of proof of scienter obscenity prosecutions would tend to restrict the exercise of freedoms of speech and press because a self-censorship would be compelled with an ultimate denial of the community's access to constitutionally protected material. In *Smith v. California,* this Court also observed that elimination of the requirement of scienter would render an obscenity statute unconstitutionally vague and thus violate procedural and substantive provisions of the Bill of Rights,

The decision of the Court in *Smith v. California,* therefore, as well as a series of recent decisions by the Court in other free speech and press areas, support the view that the prosecution in any obscenity action is required to plead and prove that the accused knew that the material involved was obscene and, with such guilty knowledge, published, distributed or sold the material with the specific intent to appeal to a prurient interest. The burden of persuasion to prove the essential elements of obscenity, guilty knowledge and unlawful specific intent rests on the prosecution as a constitutional requirement.

If the hazard of self-censorship of constitutionally protected material is to be avoided, and if the ambiguities inherent in the definition of "obscenity" are to be avoided, it is clear that mere proof of knowledge

of the contents of a writing dealing with sex is not the standard for judging scienter or unlawful specific intent. A standard which merely equates knowledge of contents with guilty knowledge and unlawful intent imposes indirectly the same absolute criminal liability expressly condemned by this Court in *Smith v. California*. Such equation amounts to no more than an arbitrary and irrational presumption of guilt which undermines all safeguards required in prosecutions involving speech and press.

The decision of this Court in *Mishkin v. New York*, 383 U.S. 502, would appear to reject mere proof of knowledge of contents as a constitutional standard for judging guilty knowledge and unlawful intent. The decision of the Court in *Rosen v. United States*, rendered in 1896, should not govern determination here. *Rosen* was decided without consideration of the constitutional implications involved in the case. Moreover, the decision was based on the *Hicklin* doctrine rejected by this Court as an impermissible standard under the Constitution. Furthermore, when *Rosen* was decided, this Court had not yet formulated the complex and strict standards for judging obscenity in the light of free speech and press requirements.

Nor should the stringent requirements of scienter in obscenity prosecutions demanded by the Constitution be undermined by claims of "difficulty of proof". This argument of convenience was rejected by this Court in *Smith v. California*, and a number of States have, by express statutory provision or judicial construction, held that pleading and proof of knowledge of the obscenity of the material involved rest upon the prosecution.

The standards and criteria for determining the quality of the proof essential to support findings of scienter and mens rea in the light of the constitutional demands are a separate question. In reviewing the evidence in a free speech or free press case in order to determine whether or not a judgment limiting freedoms of speech and press can find constitutional support in the record, this Court has constantly observed that the standards are strict for assessing the adequacy of proof needed to make out a case of "criminal speech". Proof beyond a reasonable doubt in such cases means proof which is clear, unequivocal and convincing, and which leaves no troubling doubt. The protection of speech and press which are not obscene necessitates, among other things, clear proof of knowledge by the accused that the material involved is obscene and that in the dissemination of such material the accussed had a specific guilty purpose.

The case herein raises two significant questions in the obscenity area. The Kentucky statute was construed and applied below to this petitioner so as to deny petitioner the right to testify and show, by evidence, that he in good faith neither knew the contents nor the alleged obscene character of the writing involved. Moreover, the Kentucky statute also relieves the prosecution of its burden of proof of unlawful knowledge and intent by providing that the dissemination of a writing found to be obscene shall be *prima facie* evidence that the disseminator had knowledge of the obscene character of the material. In both respects, the statute, as construed and applied, deprives petitioner of liberty without due process of law and arbitrarily abridges the exercise of freedoms of speech and press contrary to

the provisions of the First and Fourteenth Amendments.

Petitioner requested the trial court to instruct the jury that if petitioner had a good faith belief that the magazines in question were not obscene, then the jury should acquit the petitioner even if it found the publications to be obscene. This instruction was refused, as were all other instructions requested by petitioner which emphasized that the prosecution was bound to prove knowledge of the obscenity of the material and specific unlawful intent, and that the burden of persuasion was upon the prosecution.

At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. Numerous decisions by this Court and by state courts recognize this pervasive principle. Moreover, it should be noted that the question of the right to have the jury pass on the issue of the good faith belief of an accused in an obscenity prosecution implicates the more basic issues of freedoms of speech and press under the Constitution. The constitutional principles which led this Court to impose the scienter requirement in *Smith v. California* necessitate the acceptance of honest ignorance of the obscene nature of a writing as a constitutionally required defense. Subsequent decisions of this Court in other First Amendment areas as well as critical comments of noted commentators in this area support the view that honest belief that a book is not obscene is a constitutionally required defense.

Petitioner was not only deprived of procedural and substantive due process by the failure of the trial court

to instruct as requested, but he was also denied any opportunity to prove, by oral or documentary evidence, that he lacked knowledge of the contents or the alleged obscenity of the two publications involved. On this record, therefore, it must be assumed that petitioner had no knowledge of the contents or alleged obscenity of the material. The statute, as thus construed and applied by the trial court, deprives an innocent person of the right to defend himself against the accusation made by the State. The jury was permitted to conclusively presume guilt and licensed to make its own subjective determination on the issue of scienter.

Under the Kentucky statute, the mere sale of a magazine or other writing is, on its face, evidence that the vendor had knowledge of the obscene character of the magazine if such magazine is found obscene. There was no adequate proof in the record here of guilty knowledge or unlawful intent. Yet, the statute authorized the trial court to submit the issues of scienter and mens rea to the jury. Such statutory proeedures for judging guilty knowledge and unlawful intent impose onerous burdens upon an accused and lead to the same self-censorship and resultant statutory vagueness condemned by this Court in *Smith v. California* and subsequent decisions.

An inference of guilty knowledge and unlawful intent from the mere sale of a writing found by a factfinder to be obscene is both irrational and unreasonable and opens the door capriciously for the conviction of innocent persons. Such an arbitrary prosecution deprives an accused of a meaningful trial and results in the abridgment of free speech and press and due process safeguards guaranteed by the Constitution.

ARGUMENT.

I.

The Standards and Criteria for Judging Issues of Guilty Knowledge and Unlawful Purpose in Obscenity Prosecutions Must Be Measured by the Requirements of the Free Speech and Press Provisions of the First and Fourteenth Amendments to the United States Constitution.

(a) This Court has stated when "the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society". *Speiser v. Randall,* 357 U.S. 513, 521. In *Smith v. California,* 361 U.S. 147, it was stated: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power" (361 U.S. at 155). "It is . . . vital", stated this Court, "that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Roth v. United States,* 354 U.S. 476, 488.

This discussion commences, therefore, with the recognition that we deal here with aspects of freedoms of speech and press, whose values are absolutely essential to the existence of a self-governing society. A recognition of this fundamental truth appears in the decisions of this Court. It follows from this that the standards and criteria for judging the scope of any limitation upon the freedoms of speech and press se-

cured by the First Amendment must be governed by the demands of the Constitution, which give the First Amendment liberties "a sanctity and sanction not permitting dubious intrusions". *Thomas v. Collins,* 323 U.S. 516, 530. It is not the standards of the criminal law but those of the First Amendment which determine the Government's power to suppress or punish the circulation of books and other communications. "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 269.[8]

(b) In *Roth v. United States,* 354 U.S. 476, this Court promulgated, for the first time, a definition of obscenity, at the same time rejecting the *Hicklin* standard "as unconstitutionally restrictive of the freedoms of speech and press" (354 U.S. at 489). It was held that the standards for judging obscenity, as promulgated by the Court, were sufficiently limited to withstand the charge of constitutional infirmity, both as a matter of substantive and procedural due process. The

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[8]See, *Speiser v. Randall,* 357 U.S. 513, 520-529; *Smith v. California,* 361 U.S. 147, 152-154; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717, 729-733; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 65-66; *A Quantity of Copies of Books, et al. v. Kansas,* 378 U.S. 205, 210-213; *Freedman v. Maryland,* 380 U.S. 51, 57-59. See also, *Rosenblatt v. Baer,* 383 U.S. 75, 83-84; *Elfbrandt v. Russell,* 384 U.S. 11, 15-19; *Ashton v. Kentucky,* 384 U.S. 195, 198-201; *Henry v. Collins,* 380 U.S. 356; *Lamont v. Postmaster General,* 381 U.S. 301, 308-310; *Garrison v. Louisiana,* 379 U.S. 64, 73-75; *Stanford v. Texas,* 379 U.S. 476, 481-486; *Griswold v. Connecticut,* 381 U.S. 479, 482-486.

decisions which followed *Roth* continually reiterated that sex and obscenity were not synonymous, and that the standards for judging obscenity as enunciated by the Court were strict, to be applied with constant regard for the broad protection afforded the freedoms of speech and press provisions of the First and Fourteenth Amendments. *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684; *Jacobellis v. Ohio,* 378 U.S. 184.

Under the definition of obscenity as elaborated in the decisions of this Court, the following essential ingredients are therefore required to be established: (1) the material must go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex; nudity or excretion; (2) the dominant theme of the material, taken as a whole, must appeal to prurient interest; (3) the material must be utterly without social importance; and (4) the constitutional status of the material cannot be made to turn on a weighing of the social importance of the material against its alleged prurient appeal.[4]

The Court has therefore decided that actions under obscenity statutes, federal or state, cannot be maintained under the Constitution unless, at the very least,

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[4]In *Ginzburg v. United States,* 383 U.S. 463; and *Mishkin v. New York,* 383 U.S. 502, this Court held that "in close cases" evidence of defendant's "pandering" in the production, sale and publicity with respect to the material involved might be probative with respect to the nature of the material in question and, thus, satisfy the *Roth* test (383 U.S. at 474). The addition of the element of "pandering" would appear to make the legal definition of the word "obscenity" more obscure. The issue of "pandering" is not involved in the case herein but the new element imported into the definition of "obscenity" affects the questions of knowledge and intent involved in the proceedings herein.

it is "established" by the State that all of the aforesaid essential ingredients "coalesce". *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413, 418.

(c) That questions of guilty knowledge and unlawful purpose are significantly presented in any obscenity prosecution was first noted by the Court in *Roth v. United States,* 354 U.S. 476, 491-492. In *Roth,* it was conceded that the standards promulgated by the Court for judging obscenity were not precise, but it was held that nevertheless such enunciated standards provided reasonably ascertainable standards of guilt because both the federal and state statutes there involved, on their face and as construed and applied, included as an element of the offense proof of guilty knowledge and intent. See the decisions cited by Mr. Justice Brennan in *Roth v. United States,* 354 U.S. at 492, and the concurring opinion of Chief Justice Warren, 354 U.S. at 494-496. However, the constitutional significance of the requirement of *scienter* was not fully explored in all its facets until the determination of this Court in *Smith v. California,* 361 U.S. 147.

In striking down the California ordinance which imposed strict or absolute criminal responsibility on those engaged in the publication and dissemination of books and other forms of the printed word, this Court elaborated the principles and postulates which governed its decision that the action of the State violated the free speech and press and due process provisions of both the First and Fourteenth Amendments.

It was emphasized that the elimination of the *scienter* requirement may tend to work a substantial restriction on the freedoms of speech and press; that any procedural device adopted by a State which tends to cause

even a self-imposed restriction of free expression must be stricken down; that a statute which is patently capable of many unconstitutional applications threatens those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution; that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; and that the indiscriminate classification of innocent and guiltless behavior with knowing activity and unlawful purpose were clearly violative of the protective provisions of the Constitution. *Smith v. California,* 361 U.S. at 150-152.

Applying the aforesaid principles, this Court held that the California ordinance, though aimed at obscene matter, had such a tendency to inhibit constitutionally protected expression that it could not stand under the Constitution. "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded" (361 U.S. at 154).

In view of the ruling in *Smith v. California,* and the constitutional principles implicated therein, it appears clear that the prosecution, in any obscenity action, is required to plead and prove that the accused knew that the material involved was obscene and, with such guilty knowledge, published, distributed or sold the material with the specific intent to appeal to a prurient interest. It is of course axiomatic that the burden is always on the prosecution to plead and prove every essential ingredient of the offense. *Gojack v. United States,* 86 S. Ct. 1689, 1693. The accused is not to be con-

victed unless the prosecution "shoulder the entire load". *Tehan v. Shott,* 382 U.S. 406, 415; *Miranda v. Arizona,* 86 S. Ct. 1602, 1620; *Schmerber v. California,* 86 S. Ct. 1826, 1831. See also, *United States v. Klaw, et al.,* 350 F. 2d 155 (2 Cir. 1965).

The requirement that the prosecution prove that the accused knows that the material substantially exceeds contemporary community standards; appeals to prurient interest; and is utterly without redeeming social importance, is supported not only by decisions of this Court in obscenity actions but in related areas of speech and press. So far as obscenity actions are concerned, not only *Smith v. California* but the decision of the Court in *Freedman v. Maryland,* 380 U.S. 51, establish the constitutional requirements. Thus, in *Freedman,* it was stated that "the burden of proving that the film is unprotected expression must rest on the censor" (380 U.S. at 58). This Court further stated in *Freedman,* quoting from *Speiser v. Randall,* 357 U.S. 513, 526: "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."

In *Elfbrandt v. Russell,* 384 U.S. 11, there was involved a state loyalty oath which penalized a knowing member of an organization which had as one of its purposes the violent overthrow of government. The oath did not exclude a member who joined the organization without the specific intent to further an alleged illegal action of the group. This Court held that such loyalty oath requirement violated the First Amendment protection of freedom of association because the oath, as construed, created the "hazard of being prosecuted for

knowing but guiltless behavior" (384 U.S. at 16). It was held that the oath, without a restriction to those who join with "specific intent" to further illegal action, imposed a conclusive presumption that the member shares the unlawful aims of the organization. The oath, as construed and applied, was held to violate both the procedural and substantive due process safeguards of the Fourteenth Amendment.

In similar fashion, it is submitted, an obscenity statute which, on its face or as construed and applied, purports to punish an individual for violation of the law, without proof that such individual knew that the material was obscene and specifically intended to appeal to a prurient interest, does violence to the free speech and press provisions of the Constitution.

In *New York Times Co., et al. v. Sullivan,* 376 U.S. 254., this Court stated that "a defense for an erroneous statement honestly made is no less essential here than was the requirement of proof of guilty knowledge which in *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale" (376 U.S. at 278). In holding that a public official, suing to recover damages for a defamatory falsehood, must assume the burden of proving that the statement made with respect to the official was made with knowledge of the falsity of the statement, the Court held that any other rule would deter public criticism and be inconsistent with the First and Fourteenth Amendments. See also, *Henry v. Collins,* 380 U.S. 356. And in *Garrison v. Louisiana,* 379 U.S. 64, the power of a State to impose criminal sanctions for criticism of the official conduct of public officials was similarly

limited. "[O]nly those false statements made with the high degree of awareness of their probable falsehood demanded by New York Times may be the subject of either civil or criminal sanctions" (379 U.S. at 74).

If the Constitution protects all discussion of political affairs, and punishes only "the use of calculated falsehood" (379 U.S. at 75), then, it is submitted for similar reasons, all material dealing with sex is entitled to constitutional protection, and only those may be punished who, with knowledge of its obscenity and with specific unlawful intent, disseminate obscene material as defined by this Court.

In *Dennis v. United States*, 341 U.S. 494, the statute involved prohibited the wilful advocacy of overthrow of Government by force of violence and the organization of any group advocating overthrow of Government. This Court stated: "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." (341 U.S. at 499.) Referring to prior decisions of the Court, it was held that the language of criminal statutes must be so construed as to avoid manifest injustice and infringement of constitutional safeguards. See, *Screws v. United States*, 325 U.S. 91; *Spies v. United States*, 317 U.S. 492; *Aptheker v. Secretary of State*, 378 U.S. 500, 510-511.

In the light of all the aforesaid, it would therefore appear essential that the standards for judging *scienter* and unlawful intent in any obscenity prosecution include, as an initial requisite, pleading and proof of knowledge on the part of the accused that the material involved is obscene, and the publication, distribution or sale by such accused with specific intent to appeal to the prurient interest.

In *Mishkin v. New York*, 383 U.S. 502, 511, this Court stated: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the State with respect to the "stringent scienter requirement" and the "vital element of scienter" (383 U.S. 502, 507, fn. 5, 510), this Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter". (383 U.S. at 510, fn. 9).

It is vital, it is submitted, in the formulation of the standards for judging issues of scienter and unlawful intent that the important distinction between knowledge of contents and knowledge of obscenity be made. The question at this point of the discussion is not the quantum of proof necessary to support an obscenity conviction, but rather the standards by which courts and juries are to be guided in making their determination with respect to the proof presented. Such standards must meet the scrupulous demands of the Bill of Rights.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by this Court in *Smith v. California*. Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex is not in itself the equivalent of knowledge of the alleged obscenity of the writing. Mere proof that a publisher or distributor knows the

contents of *Lady Chatterley's Lover* or *Tropic of Cancer* in no way establishes, it is submitted, that such publisher or distributor knows that the books are obscene. See, *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960), affirming 175 F. Supp. 488 (D.C. N.Y. 1959). See also, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488-491; *Tralins v. Gerstein*, 378 U.S. 576; *Jacobellis v. Ohio*, 378 U.S. 184, 195-196; *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205; the concurring opinions of Justice Stewart in *Jacobellis* and *A Quantity of Copies of Books*, 378 U.S. at 197, 214-215; the dissenting opinion of Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463, 497-501; and the opinions of Justices Black, Douglas and Stewart that certiorari should be granted on all the questions presented by the Petition herein, and the Petition in the companion case of *Redrup v. New York*, October Term 1966, No. 3. 86 S. Ct. 1362-1363.

To equate knowledge of contents with knowledge of obscenity is, in effect, to authorize the punishment of guiltless behavior. *Elfbrandt v. Russell*, 384 U.S. 11. Moreover, such an equation amounts to no more than the creation of an arbitrary and irrational presumption of guilt which undermines all procedural safeguards required in prosecutions involving speech and press. *Baily v. Alabama*, 219 U.S. 219; *Tot v. United States*, 319 U.S. 463; *Speiser v. Randall*, 357 U.S. 513; *United States v. Romano*, 382 U.S. 136; *Morissette v. United States*, 342 U.S. 246. Further, such arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected material which the Constitution is intended to prevent. A publisher, or dis-

tributor, or bookseller, who faces prosecution and conviction for the dissemination of a book dealing with sex merely because he knows its contents, will clearly steer clear of such book. *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717; *A Quantity of Copies of Books, et al. v. Kansas,* 378 U.S. 205. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Elfbrandt v. Russell,* 384 U.S. 11.[5]

In short, it is submitted, knowledge of contents does not constitute the definition of "scienter" in obscenity prosecutions, but is only an expression of its minimum requirements. Without clear proof of knowledge of contents, there can be no finding of proof of knowledge of the alleged obscenity of the contents. But knowledge of obscenity and unlawful intent must be the constitutional standard.

The decision of the Court in *Rosen v. United States,* 161 U.S. 29, rendered in 1896, should not, it is respectfully submitted, govern determination here. In the first place, the decision in *Rosen* was rendered without discussion of the constitutional implications involved in the case, especially the relation of issues of scienter and intent in obscenity prosecutions to the free speech and press requirements of the Constitution. Secondly, the case was decided under the *Hicklin* doctrine, which this Court has held to be an impermissible standard under the Constitution. If a single page in a publication dealing with sex is to be tested by "whether the tendency of the matter is to deprave and corrupt the

[5] "[T]he ultimate question is not knowledge of the contents but knowledge of the obscenity of the contents." Note, 34 *George Washington Law Review* 552, 555 (March 1966).

morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall", or by whether it would "suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced" (161 U.S. at 43), then the disseminator of any such book might always face the danger of an arbitrary charge of guilty knowledge. *Cf., Roth v. United States,* 354 U.S. 476, 489; *Smith v. California,* 361 U.S. 147; *Mishkin v. New York;* 383 U.S. 502, 510-511.

Moreover, at the time when *Rosen* was decided, this Court had not formulated the standards for judging obscenity in the light of free speech and press requirements. Since the elements of the definition now include "contemporary community standards", "appeal to prurient interest", and "social importance", it is evident, it is submitted, that no publisher, distributor or bookseller at the present time can rationally be required to "take notice" of what in this "enlightened age" is meant by "obscenity" (161 U.S. at 42). "To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'." *Garner v. Louisiana,* 368 U.S. 157, 173.

Nor should the stringent requirements of scienter in obscenity prosecutions demanded by the Constitution be undermined by claims of "difficulty of proof". Such an argument presupposes that guilty knowledge and unlawful intent actually exist but that proof thereof is peculiarly burdensome. "But if we appraise the actual situation in this respect, without prejudging it, it is impos-

sible to attach any great weight to that argument, it amounts to no more than a bare assertion or a mere guess. It is obviously at odds with what is actually done in countless prosecutions." Hall, *General Principles of Criminal Law* (1960) 349.

Moreover, such argument of convenience has been rejected by this Court. "We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind." *Smith v. California,* 361 U.S. 147, 154. See also, *Dennis v. United States,* 341 U.S. 494, 500; *Morissette v. United States,* 342 U.S. 246, 259; *Tot v. United States,* 319 U.S. 463.[6]

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[6]A number of States have, by express statutory provision or judicial construction, held that proof of knowledge of the obscenity of the material involved is an essential element of the offense. Arizona holds that "knowingly" in its obscenity statute [Ariz.Rev.Stat.Ann. §13-532 (Supp. 1965)] means "with knowledge of the obscene nature of the materials involved". *State v. Locks,* 91 Ariz. 394, 372 P. 2d 724, 726 (1962). See also, *State v. Locks,* 97 Ariz. 148, 397 P. 2d 949, 951 (1965). California defines "knowingly" in its obscenity statute as meaning "knowledge that the matter is obscene" [Cal.Pen.Code §311]. Connecticut holds that "proof of knowledge that the proscribed material is obscene or indecent is requisite to a conviction". *State v. Sul,* 146 Conn. 78, 147 A. 2d 686, 691 (1951). Florida requires pleading and proof by the prosecution of "knowledge of the obscene character" of the material involved. *Cohen v. State,* 125 S. 2d 560 (1960). The Georgia statute [Ga.Code Ann. §26-6301 (Supp. 1965)] requires proof of knowledge of "the obscene nature of such matter". The Idaho obscenity statute [Idaho Code Ann. (1947) Sect. 18-401] punishes the "wilful and lewd" dissemination of obscene material. Illinois requires proof of the "obscene quality" of the material. *People v. Sikora,* 32 Ill. 2d 260, 204 N.E. 2d 768 (1965). The Iowa obscenity statute [Section 725.5, Code of Iowa (1962)] was recently held unconstitutional because it punished conduct "irrespective of whether or not the material dealt with was known by the purveyor to be obscene". *State v. Ramos,* D.C. Iowa, Pottawattamie Co. at Council Bluffs No. 15235 (decided 4/7/66), unreported. Louisiana requires both an intent to appeal to prurient interest

(This footnote is continued on the next page)

(e) Once it is accepted that the Constitution requires proof of knowledge of the alleged obscenity of the materials and the specific intent to appeal to prurient interest in any obscenity prosecution, then the next question presented is, it is submitted, the standards and criteria for determining the quality of the proof essential to support findings of scienter and mens rea in the light of the constitutional demands. On this issue, this Court has constantly admonished that it will review the evidence in a free speech or free press case to determine whether or not a judgment limiting such speech or press can find constitutional support in the evidence presented by the record. In short, constitutional principles may always be undermined if improperly applied in particular cases, and it becomes, therefore, essential that courts and juries receive guidance from this

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[La.Rev.Stat.Ann. §14:106 (West Supp. 1965)] and "guilty knowledge". *State v. Routa*, 241 La. 474 129 S. 2d 743 (1961). Maryland punishes the dissemination of obscene material "knowing it to be obscene". *Yudkin v. State*, 229 Md. 223, 182 A. 2d 798, 800 (1962). The Massachusetts obscenity statute [Mass.Ann.Laws Ch. 272, §28B (Supp. 1965)] expressly requires knowledge of obscenity. See, *Demetropolos v. Commonwealth*, 342 Mass. 658, 175 N.E. 2d 259 (1961). Minnesota has held that the State is required to prove "knowledge of the obscene character" on the part of a bookseller before conviction of violating the statute. *State v. Oman*, 265 Minn. 277, 121 N.W. 2d 616, 619 (1963). Ohio interprets "knowingly" in its statute [Ohio Rev.Code Ann. §2905.34 (Page Supp. 1965)] as meaning "scienter (guilty knowledge)" and "mens rea (guilty purpose)", both of which must be established. *State v. Jacobellis*, 173 Ohio St. 22, 179 N.E. 2d 777 (1962), reversed on other grounds 378 U.S. 184. Oregon, by judicial construction, has included scienter into the governing statute, holding that the language of this Court in *Smith v. California* "hints that the federal constitution may impose a more restrictive standard of scienter than is necessary to convict of offenses where free speech is not involved". *State v. Jackson*, 224 Ore. 337, 356 P. 2d 495, 499 (1960). It is apparent that the requisite constitutional standard of proof of guilty knowledge and unlawful purpose cannot be undermined by arguments of "difficulty of proof".

Court with respect to where the line may be drawn "between speech unconditionally guaranteed and speech which may legitimately be regulated". *Speiser v. Randall,* 357 U.S. 513, 525. See, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 284-288; *Napue v. Illinois,* 360 U.S. 264, 271-272; *Jacobellis v. Ohio,* 378 U.S. 184, 189.

In cases involving substantive and procedural rights guaranteed by the provisions of the Bill of Rights, this Court has held that the standards are strict for assessing the adequacy of proof needed to make out a case of "criminal speech". In *New York Times Co., et al. v. Sullivan,* 376, U.S. 254, 285-286, a civil action, the proof lacked the "convincing clarity which the constitutional standard demands" and, hence, was held inadequate to constitutionally sustain a judgment under the proper rule of law. In *Noto v. United States,* 367 U.S. 290, 299, the evidence in the record to support the jury's verdict of illegal advocacy was held lacking "in any adequately substantial degree". In *Hartzel v. United States,* 322 U.S. 680, this Court held that evidence in the record did not support a jury finding "beyond a reasonable doubt" that the accused had the specific intent to cause insubordination in the Armed Forces and to obstruct recruiting of enlistment therein. In *Baumgartner v. United States,* 322 U.S. 665, this Court held that the proof was not sufficiently "clear, unequivocal and convincing" to justify cancellation of a certificate of naturalization. This Court added that the case made out by the Government lacked that "solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen"

(322 U.S. at 670). In *Schneiderman v. United States,* 320 U.S. 118, 125, this Court held that rights of citizenship could not be lost "upon a bare preponderance of evidence which leaves the issue in doubt". See also, *Gonzales v. Landon,* 350 U.S. 920.

In *Wood v. Georgia,* 370 U.S. 375, this Court could find nothing presented in the record to justify a finding of clear and present danger to the administration of justice and therefore reversed a contempt conviction which punished a sheriff for expressions of opinions ordinarily protected by the free speech guarantees of the Constitution. In *Edwards v. South Carolina,* 372 U.S. 229, upon an independent examination of the whole record, this Court held that the accused were convicted upon evidence "which showed no more" than opinions which were "sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection" (372 U.S. at 237). In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, Justice Harlan, in deciding that the proof was insufficient to justify a holding that the publishers knew that their advertisers were offering obscene matter for sale, observed that the burden of proof on the issue of scienter was not satisfied merely by showing that a defendant did not make a "good faith effort" to ascertain the character of his advertisers' materials (370 U.S. at 493). See also, *Thompson v. City of Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Shuttlesworth v. City of Birmingham,* 382 U.S. 87.

A distillation of the aforesaid cases clearly reveals the necessity of strict proof requirements in free speech and press cases imposed by the provisions of the Constitution. Since proof of scienter and mens rea are neces-

sary and essential to save obscenity statutes from constitutional infirmity, both substantive and procedural, it appears essential that proof of such knowledge of obscenity and unlawful intent be clear, convincing, unequivocal and without doubt in order to protect speech and press which is not obscene. *Cf., United Mine Workers of America v. Gibbs,* 383 U.S. 715, 737.

(f) In the discussion which follows hereinafter in this brief, two other significant principles in this area are examined: the first, whether an accused in an obscenity prosecution may constitutionally be denied the right to testify and show by evidence that he in good faith neither knew the contents nor the alleged obscene character of the writing involved; the second, whether a State may relieve the prosecution of its burden of proof of unlawful knowledge and intent by providing that the dissemination of a writing found to be obscene shall be *prima facie* evidence that the disseminator had knowledge of the obscene character of the material. The discussion of these latter questions is premised on the standards heretofore discussed, to wit, that scienter and mens rea in obscenity prosecutions mean knowledge of the alleged obscenity of the material and specific intent to appeal to the prurient interest; that the State has the burden to plead and prove these elements of the offense beyond a reasonable doubt, or its equivalent, by clear, convincing and unequivocal evidence—these principles being essential in the light of the requirements of the Constitution.

II.

The Pertinent Provisions of the Kentucky Revised Statutes, on Their Face and as Construed and Applied to Eliminate a Defense of Good Faith Belief That Publications Are Not Obscene, and to Exclude Evidence, Both Oral and Documentary, Showing That an Accused in an Obscenity Prosecution Has No Knowledge of the Contents or of the Alleged Obscenity of the Publications, Abridges Freedoms of Speech and Press and Arbitrarily Deprives the Accused of Liberty Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments.

(a) Petitioner requested the trial court to instruct the jury that if "the defendant had a good faith belief that the magazines in question were not obscene", then the jury should acquit the defendant even if it found the publications to be obscene [Deft. Inst. No. 19; R. 100-101]. The Court refused to give such instruction. Thus, under the Kentucky statute, a conviction may be had even if the disseminator of the writing honestly believes that the publication is not obscene. Therefore, as the State construes its obscenity statutes, once the prosecution has proved its case on issues of scienter, there is a conclusive presumption that the accused had the required guilty knowledge and unlawful intent, and the accused may not be absolved even if in fact the accused honestly did not believe that the publications were obscene. In short, an accused, in a prosecution brought under the Kentucky statute, may be convicted for possessing guilty knowledge and unlawful purpose when, admittedly and in fact, he had none.

It is submitted that such construction of the obscenity statute renders the statute constitutionally infirm. It subjects the statute to the same due process infirmities of vagueness which offend both the free speech and press provisions as well as the procedural due process provisions of the Constitution. *Smith v. California,* 361 U.S. 147.[7]

In *Screws v. United States,* 325 U.S. 91, this Court held that the section of the statute there involved, penalizing conduct depriving persons of rights, privileges or immunities secured or protected by the Constitution and laws of the United States, could only constitutionally be upheld if construed to require a specific intent on the part of an accused to deprive a person of a federal right, made definite by decision or other rule of law. This Court stated that otherwise an accused might be condemned as "a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee" (325 U.S. at 97). In *Morissette v. United States,* 342 U.S. 246, the accused sought to show that he did not intend to steal certain property but thought that the property was abandoned. The trial court held, however, that the accused would not be permitted to show his belief that the property was abandoned, and the court refused to submit to the jury whether the accused acted with innocent intention. In reversing the conviction, this Court stressed the numerous judicial rulings which "have

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[7] "Little is to be gained by punishing the legitimate bookseller who unknowingly offers an obscene publication for sale to the public. The end result of such misguided prosecution can only be a breeding of disrespect for the law and suppression of the free exchange of ideas." Note, 21 Oh.St.L.J. 242, 244 (1960).

sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes * * * The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries" (342 U.S. at 252, 263).

In *Weiman v. Updegraff,* 344 U.S. 183, 191, it was held: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." See also, *American Communications Assn. v. Douds,* 339 U.S. 382, 413; *Elfbrandt v. Russell,* 384 U.S. 11, 16-17. In *Garrison v. Louisiana,* 379 U.S. 64, 73, this Court, in holding the Louisiana criminal libel statute to be constitutionally invalid, stated, among other things, that a speaker should be protected even if he did speak out of hatred if his utterances were "honestly believed". In *United States v. Murdock,* 290 U.S. 389, the accused was indicted for refusal to give certain testimony and supply information as to deductions claimed in his income tax returns. The accused requested the trial court to instruct the jury that if it found that the reasons stated by the accused in his refusal to answer the questions "were given in good faith and based upon his actual belief" then the jury should consider these elements in determining whether or not the refusal to answer questions was wilful (290 U.S. at 393). This Court held that the accused was entitled to the charge he requested "with respect to his good faith and actual belief" (290 U.S. at 396).

The aforesaid decisions are only examples of a general pervasive principle. At common law, an honest and

reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. *Regina v. Tolson* (1889), 23 Q.B.D. 168. See, *People v. Powell*, 63 N.Y. 88 (1875); *People v. Vogel*, 46 Cal. 2d 798, 299 P. 2d 850 (1956) [bigamy charge—error to deprive defendant of defense of bona fide reasonable belief that he was free to remarry]; *People v. Stuart*, 47 Cal. 2d 167, 302 P. 2d 5 (1956) [fatal prescription by pharmacist—reasonable mistake or unavoidable action may be shown]; *People v. Hernandez*, 61 Cal. 2d 529, 393 P. 2d 673, 39 Cal. Rptr. 361 (1964) [statutory rape—accused may show reasonable belief that prosecutrix had reached age of consent].

Against the background of the aforementioned decisions, it should be noted more importantly that the question of the right to have the jury pass on the issue of the good faith of an accused in an obscenity prosecution implicates free speech and press issues. It is submitted that all the constitutional principles which led the Court to impose the scienter requirement in *Smith v. California*, 361 U.S. 147, necessitate acceptance of honest ignorance of the obscene nature of a writing as a constitutionally required defense. Indeed, a state court has so interpreted the decision of this Court in *Smith v. California*. *State v. Hudson County News Co.*, 35 N.J. 284, 290, 173 A. 2d 20, 23 (1961).

Professors Lockhart and McClure have stated that "we believe the court should rule that the scienter requirement has not been met if . . . the seller honestly believed that the book was not obscene". *Censorship of Obscenity: The Developing Constitutional Standards*,

45 Minn. L. Rev. 5, 107. The authors state (*Ibid.*, at p. 106):

> ". . . The strong public interest in encouraging dissemination of non-obscene literature, which motivated the imposition of the scienter requirement, dictates an affirmative answer. In the case of blatantly hard-core pornography, such a defense would obviously be rejected as untrue. But the character of many books is such that it will be impossible, under evolving constitutional standards, to determine in advance of a judicial ruling whether a book is 'obscene,' even with the best legal advice. To require that a bookseller sell such a book at his peril would constitute a substantial deterrent to the sale of significant literature that is not obscene, for it would result in the very 'self-censorship . . . privately administered' and 'timidity in the face of absolute criminal liability' that the Court sought to avoid by imposing the scienter requirement."[8]

The American Law Institute has expressed the belief that "a possibility of acquittal for honest igno-

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[8]Professors Lockhart and McClure reject the notion that because a defendant is permitted to testify that he was honestly ignorant of the alleged obscenity of the material involved that this would cause difficulty in enforcement. They state that "adjudications that a book is obscene can readily be obtained under statutes authorizing declaratory judgment or book libel proceedings, or under the growing volume of statutes authorizing injunctions against the sale of particular obscene material" (*Ibid.*, at 106-107). By giving due process notice thereafter, to interested parties, the authors indicate that the State's interest in effective control would be protected. But aside from such notice, it is difficult to understand why the mere denial by defendant that he had knowledge of the alleged obscenity of a writing forecloses a prosecutor from proving the contrary. Moreover, recognition of a defense of honest ignorance may be of aid in preventing those extra legal procedures of public officials and private organizations which are encouraged in their activities by uncertainties in the law.

rance should be preserved." A.L.I. *Model Penal Code* (Tent. Draft. No. 6, 1957) 51. The Institute stated that "retention of this *mens rea* defense will help to preserve a proper conservatism in law enforcement effort in this field" (*Ibid.*, at 51). The Institute rejected any "conclusive" presumption of knowledge (*Ibid.*, at 51). See also, Note, The Supreme Court 1959 Term, 74 Harv. L. Rev. 81, 126-128 (1960); 27 F.R.D. 157-158.

A statute which deprives an accused in an obscenity prosecution of good faith belief that the material involved is not obscene would appear to be susceptible of sweeping and improper applications and of thus becoming a deterrent to the exercise of constitutionally protected speech and press. "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky,* 384 U.S. 195, 200. See also, *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403; *Dombrowski, et al. v. Pfister,* 380 U.S. 479, 486-487; *Lamont v. Postmaster General,* 381 U.S. 301, 308-310.

Moreover, this Court has stated that the Fourteenth Amendment requires that "regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line". *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66. Only recently, this Court noted "the ambiguities inherent in the definition of obscenity". *Mishkin v. New York,* 383 U.S. 502, 511. It is clear that publishers, distributors and booksellers are necessarily required to speculate in this area as to whether a book

dealing with sex is obscene under the imprecise standards now existing for the judging of obscenity. To deprive such persons of a defense of honest ignorance can only deter the sale of constitutionally protected books and other related media of communication. Moreover, it is submitted, to deprive an accused in an obscenity prosecution of a defense of good faith belief that the material was not obscene is to deny an accused the right to be meaningfully heard in his own defense. It is a denial of due process "in the primary sense". *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 681; *Saunders v. Shaw,* 244 U.S. 317; *Hovey v. Eliott,* 167 U.S. 409, 417.

(b) The unlawful construction and application of the statute is further exemplified by the rulings of the trial court. Every effort on the part of petitioner to prove a lack of knowledge of the contents or the alleged obscenity of the two publications was thwarted by the trial court. Petitioner was not permitted to prove, either through his own testimony or through the testimony of his employees, that it was impossible to inspect each of the writings sold at Readmore [R. 30-31, 50]. Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office Department, that he had written to all his publishers to that effect, and that he had instructed his employees not to distribute magazines which had no second-class mailing permits. All of these offers were rejected [R. 30-32, 33-34, 35-37; Deft. Ex. 1 for Ident.]. Furthermore, petitioner's offer to prove that a wide variety of comparable magazines were sold by him without bar or restriction by any governmental authority was also rejected [R. 35-37]. Hence, every effort by petitioner to

prove that he had no knowledge of the alleged obscenity of the publications was frustrated by the trial court.

Since petitioner offered to prove that he was unaware of the contents of the publications or the alleged obscenity of the material, it must be assumed that petitioner had no knowledge of the contents or alleged obscenity of the material involved. *Lambert v. California,* 355 U.S. 225, 227. The result of such action by the trial court was to create the same vagueness and ambiguity in the law which this Court condemned in *Smith v. California,* 361 U.S. 147. The statute, as construed and applied by the trial court, resulted in the deprivation of an opportunity by an innocent person to defend himself against the accusation made by the State and the prosecution thereunder. The jury was permitted to conclusively presume guilt and licensed to make its own subjective determination on the issue of scienter. See, *Bailey v. Alabama,* 219 U.S. 219; *Tot v. United States,* 319 U.S. 463; *Speiser v. Randall,* 357 U.S. 513; *United States v. Romano,* 382 U.S. 136; *Herndon v. Lowry,* 301 U.S 242, 263.

Again, aside from free speech and press considerations, the actions of the trial court deprived petitioner of those procedural due process guarantees which are intended to protect at all times individuals charged with or suspected of crime. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States,* 318 U.S. 332, 347. See also, *Holden v. Hardy,* 169 U.S. 366, 389-390; *Hovey v. Eliott,* 167 U.S. 409, 417; *Morgan v. United States,* 298 U.S. 468, 480-481.

The criminal charge of unlawful dissemination of an allegedly obscene publication presupposes that the ac-

cused knew the contents of the material and knew that the material was obscene and, with such guilty knowledge, disseminated the material with intent to appeal to prurient interest. Conviction on such a charge, without permitting an accused a defense or the opportunity to prove that he was honestly ignorant of the contents and obscene nature of the material, arbitrarily and capriciously deprives such an accussed of any meaningful trial, and deprives him of all the procedural and substantive safeguards guaranteed to the accused by the protective arms of the Bill of Rights.

III.

The Provision of the Kentucky Statute Which Makes the Dissemination of a Publication Found to Be Obscene to Be Prima Facie Evidence That the Disseminator Had Knowledge of the Obscene Character of the Writing Abridges the Exercise of Freedoms of Speech and Press, and Arbitrarily Deprives Persons of Liberty Without Due Process, Contrary to the Provisions of the First and Fourteenth Amendments.

The state statute [K.R.S. 436.100(4)] provides that the sale of any magazine "found to be obscene, shall be prima facie evidence that the seller . . . who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure". Hence, the mere sale of a magazine or other writing by a bookseller in a retail establishment is, on its face, under the statute, evidence that the vendor had knowledge of the "obscene character" of the magazine if such magazine is found obscene. Without adequate proof in the record of guilty knowledge or unlawful intent, as in the case herein, the statute authorizes a trial court to submit the

issues of scienter and mens rea to a jury, and for such jury to determine questions of obscenity as well as guilty knowledge and unlawful intent.

This Court has emphasized that "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, . . . provide but shifting sands on which the litigant must maintain his position." *Speiser v. Randall,* 357 U.S. 513, 526. See also, *Freedman v. Maryland,* 380 U.S. 51, 58.

Knowledge of the obscenity of a writing includes such factual elements as knowledge that a writing substantially exceeds contemporary community standards, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; that such writing appeals to prurient interest; and is utterly without social importance. These are complex factors, not easily decided, as the decisions of this Court from *Roth* through *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413, make abundantly clear. To place upon an accused the burden of proving the negative in all such respects is both unreasonable and unjust. It can only result in that same self-censorship, with resultant detriment to the community, which this Court noted in *Smith v. California,* 361 U.S. 147. See also, *New York Times Co., et al. v. Sul-*

livan, 376 U.S. 254, 283-284; *Garrison v. Louisiana,* 379 U.S. 64, 73-74; *Henry v. Collins,* 380 U.S. 356. To permit the burden to be placed upon an accused without proof by the prosecution that the accused had guilty knowledge or unlawful intent is to enable convictions to take place without proof of scienter, and despite the protestations of the accused, so long as the factfinder believes that the material involved is obscene.[9]

It is plain that under such procedural standards for judging obscenity, a publisher, distributor or bookseller will refrain from dealing with any book or writing involving sex in order to avoid assuming such onerous and impossible burdens. No accused, it is submitted, can fairly sustain the burden of proving lack of scienter when the mere sale of a writing is *prima facie* evidence of scienter if the trier of the facts believes that the writing is obscene. There is no reason why the State should be permitted to adopt such "a short-cut procedure which must inevitably result in suppressing protected speeck". *Speiser v. Randall,* 357 U.S. 513, 529.

The right to a jury trial in an obscenity prosecution has a significance greater than an ordinary criminal trial. See the dissenting opinion of Justice Brennan in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 448; and the dissenting opinion of Chief Justice Warren in *Times*

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[9]Moreover, in the case herein the trial court refused to instruct the jury that petitioner should be acquitted if he honestly believed that the material involved was not obscene, and petitioner was not permitted to place before the jury evidence of his lack of knowledge of the contents and knowledge that the material was obscene. Furthermore, the trial court refused to instruct specifically that the prosecution was bound to prove knowledge of the obscenity of the material and specific unlawful intent, and that the burden of persuasion was always upon the prosecution [Deft. Inst. Nos. 6, 8, 20, 21, 22, 23; R. 97, 101]. Such a trial denies both justice and the appearance of justice.

Film Corp. v. City of Chicago, 365 U.S. 43, 68-69. See also, the opinion of Justice Stewart in *Volanski v. United States*, 246 F. 2d 842 (6 Cir. 1957). The jury is the factfinder and, moreover, it is the factfinder in the more important sense since it is initially determining whether or not a writing shall be afforded constitutional protection and whether or not an accused shall be punished for the dissemination of a writing. It is for the jury to decide whether or not an accused in an obscenity prosecution has the guilty knowledge and unlawful intent which places upon the accused the stigma of conviction on a finding that the writing involved is obscene. Clearly, under such circumstances, for a State by its legislature, or by a judge in his rulings, to undermine the function of the jury by creating a "prima facie" case of guilty knowledge and unlawful intent, without proof in support thereof, is to deprive the accused indirectly of the guarantee of a jury trial.

An inference of guilty knowledge and unlawful intent merely from the sale of a writing found by a factfinder to be obscene is both irrational and unreasonable, and opens the door capriciously for the conviction of innocent persons. A publication which a jury has found obscene will inevitably lead the jury to subjectively assume that what the jury knows, the publisher, distributor or bookseller should also have known. Proof that a writing was sold does not rationally support a conclusion that the seller was aware of its alleged obscene character. *Speiser v. Randall,* 357 U.S. 513; *United States v. Romano,* 382 U.S. 136; *Tot v. United States,* 319 U.S. 463, *Bailey v. Alabama,* 219 U.S. 219.

The statute not only creates an irrational presumption, but it is a presumption which results in the abridgment and deprivation of fundamental constitutional rights. On its face, the statute is capable of sweeping within its ambit constitutionally protected expression and of inhibiting the circulation of the material protected by the provisions of the First Amendment. The statute thus places limitations on free speech and press, undermines procedural safeguards important in prosecutions involving speech and press and, in effect, unlawfully compels persons to take the stand in criminal prosecutions and prove the lawfulness of their conduct under onerous and unfair circumstances. "[W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall,* 357 U.S. 513, 528-529. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Freedman v. Maryland,* 380 U.S. 51; *Miranda v. Arizona,* 86 S.Ct. 1602.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN and
CHARLES A. WILLIAMS,
Of Counsel.

APPENDIX A.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

5. The pertinent provisions of Kentucky Revised Statutes, section 436.100 are:

> "(1) Where the term 'person' is used in this section, it shall be taken to mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.
>
> "(2) Any person who, with knowledge of the contents or character, sells, lends, gives away or shows, offers to sell, lend, give away or show,

has in his possession with intent to sell, lend, give away or show, or advertises in any manner or otherwise offers for sale, loan, gift or distribution any obscene book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such matter or article, or who writes, prints, publishes or utters or causes to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state, where, how, of whom or by what means any such matter or article named in this section can be purchased, obtained or had, or who employs, uses or permits any minor to do so, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both so fined and imprisoned.

. . .

"(4) The sale, loan, gift, showing or offer to sell, loan, or the possession with intent to sell, lend, give away or show of any book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image found to be obscene, shall be prima facie evidence that the seller, lender, giver or possessor who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure. (1962, c. 273, § 2; subsections (1), (3) and (4) created by 1962, c. 273, §§ 1, 3 and 4)."